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No. 94-1739

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NATIONAL PAINT & COATINGS ASSOCIATION, *et al.*,
Petitioners,
v.
CITY OF CHICAGO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Commerce Clause requires heightened judicial scrutiny of legislation that prohibits the sale of items likely to be used for graffiti vandalism but does not create any discriminatory or disproportionate burden on interstate commerce.

2. Whether the Commerce Clause requires a district court to conduct a trial to determine whether a non-discriminatory prohibition on the sale of items likely to be used for graffiti vandalism is likely to achieve the putative benefit identified by the legislature in enacting the measure.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT	1
ARGUMENT	6
CONCLUSION	19

TABLE OF AUTHORITIES

CASES: Page

Amanda Acquisition Corp. v. Universal Foods Corp., 877 F.2d 496 (7th Cir.), cert. denied, 493 U.S. 955 (1989) 16
Barber v. Hawaii, 42 F.3d 1185 (9th Cir. 1994) 13
Blue Circle Cement v. Board of County Commissioners, 27 F.3d 1499 (10th Cir. 1994) 14, 15
Brotherhood of Locomotive Fireman & Enginemen v. Chicago R.I. & P. Co., 393 U.S. 129 (1968) 18
C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677 (1984) 9, 11, 12
Chemical Waste Management v. Hunt, 112 S. Ct. 2009 (1992) 15
City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 14
Cooper v. McBeath, 11 F.3d 547 (5th Cir.), cert. denied, 114 S. Ct. 2675 (1994) 13, 14
CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) 12
Diamond Waste, Inc. v. Monroe County, 939 F.2d 941 (11th Cir. 1991) 14
Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 3, 12
Ferguson v. Skrupa, 372 U.S. 726 (1963) 6
Fireside Nissan, Inc. v. Fanning, 30 F.3d 206 (1st Cir. 1994) 13, 16
Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 112 S. Ct. 2019 (1992) 15
Instructional Systems, Inc. v. Computer Curriculum Corp., 45 F.3d 813 (3d Cir. 1994), cert. denied, 115 S. Ct. 1176 (1995) 16
Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) 9, 11, 17
Lochner v. New York, 198 U.S. 45 (1905) 16
Medigen of Kentucky, Inc. v. Public Service Commission, 985 F.2d 164 (4th Cir. 1993) 14
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

New York State Trawlers Association v. Jorling, 16 F.3d 1303 (2d Cir. 1994) 15, 16
Old Bridge Chemicals, Inc. v. New Jersey Department of Environmental Protection, 965 F.2d 1287 (3d Cir.), cert. denied, 113 S. Ct. 602 (1992) 16
Oregon Waste Systems, Inc. v. Department of Environmental Quality, 114 S. Ct. 1345 (1994) 11, 12, 15
Pacific Northwest Venison Producers v. Smitch, 20 F.3d 1008 (9th Cir.), cert. denied, 115 S. Ct. 297 (1994) 16
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) ....*passim*
Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978) 9, 11, 17
SDDS, Inc. v. South Dakota, 47 F.3d 263 (8th Cir. 1995) 13
Sherwin Williams Co. v. City and County of San Francisco, 857 F. Supp. 1355 (N.D. Cal. 1994) .. 2
South Carolina State Highway Department v. Barnwell Brothers, Inc., 303 U.S. 177 (1938) 9

CONSTITUTIONAL PROVISION:

U.S. Const. art. I, § 8, cl. 3 3

ORDINANCE:

Municipal Code of Chicago, Ill. § 4-132-150 (1992) .. 3
Municipal Code of Chicago, Ill. § 135-14.1 (1984) .. 2

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1-18) is reported at 45 F.3d 1124 (7th Cir. 1995). The opinion of the United States District Court for the Northern District of Illinois in which that court rendered its final judgment (Pet. App. 20-51) is reported at 835 F. Supp. 421 (N.D. Ill. 1993). The opinion of the district court granting in part and denying in part the motion to dismiss petitioners' complaint is reported at 803 F. Supp. 135 (N.D. Ill. 1992).

STATEMENT

The City of Chicago has long faced the problem of graffiti vandalism—the intentional defacing of property, without the consent of the owner, by marking that property with a design or drawing so that it may be seen by

the public. See Pet. App. 25-26. The magnitude of that problem is staggering: graffiti vandalism pervades the City of Chicago on every conceivable type of private and public property. *Ibid.* Five million square feet of property in Chicago are defaced by graffiti. *Ibid.*

In combatting this problem, the City, other public agencies, and private parties as well, have been forced to devote scarce resources to remove the work of graffiti vandals. This graffiti-abatement effort costs millions of dollars, as well as significant amounts of time and energy, annually. Pet. App. 25. But graffiti vandalism imposes other costs on our communities as well: it can undermine the psychological well-being and the stability of communities and neighborhoods. *Id.* at 25-26.

By May 1992, it was clear that existing restrictions on the sale of spray paint in the City of Chicago were not working. For many years, the City had prohibited the sale of spray paint to persons under 18 years old. See Municipal Code of Chicago, Ill. § 135-14.1 (1984). Nevertheless, graffiti vandals still tend to be teenagers. See Pet. App. 38-39 (minors produce almost all of the graffiti in Chicago). The City also had attempted a three-pronged effort to combat graffiti: education, eradication, and enforcement. See *id.* at 43-44. This, too, did not work. And Chicago was not the only city plagued by graffiti and coming to the conclusion that additional enforcement tools were needed. In the fall of 1993, San Francisco, for example, enacted a so-called lock-up law, which prohibits the display of spray paint and marker pens in an area of a store that is accessible to the public without employee assistance. See generally *Sherwin Williams Co. v. City and County of San Francisco*, 857 F. Supp. 1355 (N.D. Cal. 1994) (upholding lock-up law against Commerce Clause challenge on essentially the same evidence as in this case).

The City of Chicago decided on another approach to attempt to ameliorate the problem of graffiti. That in-

novation, the first of its kind in the country, was an ordinance, enacted in May 1992 by the Chicago City Council, that prohibited the sale at retail of spray paint and large-tip markers. See Municipal Code of Chicago, Ill. § 4-132-150 (1992).[1]

Less than a month later, petitioners filed suit challenging the ordinance on a variety of grounds. Petitioners raised claims involving the Commerce Clause; the Equal Protection Clause; the Due Process Clause, both substantive and procedural; First Amendment overbreadth; and several state law grounds. After the City's motion to dismiss was granted in part, three claims remained: that the challenged ordinance (1) imposed an impermissible burden on interstate commerce in violation of the dormant Commerce Clause;[2] (2) violated the guarantee of substantive due process under the United States Constitution; and (3) constituted an illegitimate exercise of the police power afforded the City under the Illinois Constitution. The district court concluded that it required an evidentiary hearing to resolve petitioners' remaining constitutional claims. See *National Paint & Coatings Association v. City of Chicago*, 803 F. Supp. 135, 143-44, 146-47 (N.D. Ill. 1992). On petitioners' dormant Com-

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[1] The ordinance provides:

> It shall be unlawful for any person holding a retail business license to sell paint in spray cans to any person or to sell any marker containing a fluid which is not water soluble and has a point, brush, applicator or other writing surface of three-eighths of an inch or greater to any person.

Municipal Code of Chicago, Ill. § 4-132-150 (1992). We refer hereafter to spray paint and large-tip markers collectively as "spray paint."

[2] Although the text of the Commerce Clause contains only a grant of authority to Congress to regulate interstate commerce (see U.S. Const. art. I, § 8, cl. 3), the Court has understood the negative or dormant aspect of the Clause to invalidate state or local regulation that impermissibly burdens interstate commerce even in the absence of congressional action. *E.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128 (1988).

merce Clause challenge, the district court concluded that the spray-paint ordinance regulated inter- and intrastate commerce evenhandedly, was directed at a legitimate governmental interest, and imposed only an incidental burden on interstate commerce. See 803 F. Supp. at 142-43. Nevertheless, the district court held that that claim should survive a motion to dismiss because only a trial would disclose whether the spray-paint ordinance was likely to achieve its goal of reducing graffiti vandalism in Chicago. See *ibid.* The court believed that *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), authorized it to make findings of fact on the efficiency of the ordinance. The district court relied on this passage from *Pike* for that notion:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Id. at 142. Accordingly, the district court conducted a six-day bench trial. Nine experts for both sides testified about the likely effect of the ordinance.

After the trial, the district court concluded, on the Commerce Clause issue, that the ordinance would not be effective in achieving its goal of deterring graffiti in Chicago, but would prevent law-abiding residents of Chicago from purchasing spray paint. See Pet. App. 46-48. According to the district court, the ordinance therefore failed the *Pike* test—and violated the dormant Commerce Clause—because there are no "putative local benefits" to weigh in the balance against the admitted effect that the ordinance will have on interstate commerce. *Ibid.* The court also concluded that the ordinance was arbitrary, in violation of substantive due proces doctrine, also essentially because, in the court's view, the ordinance would not be effective. See *id.* at 48-49. Finally, the court believed that the ordinance exceeded the limits of the City's police power under Illinois law. See *id.* at 49-50.

The Seventh Circuit reversed the district court on all grounds. The court quickly disposed of the district court's reasoning on the City's police power under Illinois law and substantive due process, and then turned to the Commerce Clause, which is the only issue petitioners continue to press. In discussing the dormant Commerce Clause, the Seventh Circuit explained that there are three categories of local laws affecting commerce: laws that "explicitly discriminate against interstate commerce" (Pet. App. 11), such as laws that prohibit the importation into a state of articles of commerce from outside that state; laws that are neutral on their face as between states, "but that bear more heavily on interstate commerce than on local commerce" (*ibid.*), such as laws setting a maximum permissible length on truck trailers that is shorter than that of surrounding states; and laws that "affect commerce without any reallocation among jurisdictions—that do not give local firms any competitive advantage over those located elsewhere" (*id.* at 12). The Seventh Circuit concluded that the City's spray-paint ordinance fits into this third category: although the ordinance certainly affects interstate commerce, it does so without any disparate impact on interstate commerce. See *id.* at 13-14. Because the court had already found a rational basis for the legislature's conclusion that the ordinance would be an effective means to combat graffiti vandalism when rejecting petitioner's due process challenge (see Pet. App. 6-7), it upheld the ordinance under the dormant Commerce Clause as well (see *id.* at 14).

On March 3, 1995, Justice Stevens denied petitioners' application for a stay of the judgment of the court of appeals pending the filing and disposition of a petition for certiorari. The ordinance, implementation of which had been enjoined for nearly three years, then went into effect after a short grace period.

ARGUMENT

Ignoring this Court's admonition that "it is up to legislatures, not courts, to decide the wisdom and utility of legislation," *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981) (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963)), petitioners ask the Court to review the Seventh Circuit's determination that a court lacks authority to invalidate nondiscriminatory local legislation under the Commerce Clause solely because it doubts the efficacy of that legislation. In petitioners' view, the district court properly made its own findings of fact as to the costs and benefits flowing from Chicago's spray-paint ordinance, and then properly invalidated it, because "the ordinance would not lessen graffiti in Chicago; and . . . less restrictive alternatives existed for combatting graffiti." Pet. 4. Nothing in *Pike* or its progeny, however, authorizes such scrutiny of a nondiscriminatory enactment. To the contrary, *Pike* commands deference to a legislative judgment on the wisdom and utility of nondiscriminatory state and local laws.

In this case, the district court departed from the proper scope of dormant Commerce Clause jurisprudence. The dormant Commerce Clause prohibits only discriminatory or irrational burdens on interstate commerce. Here, the district court did not invalidate Chicago's spray-paint ordinance because it thought that the ordinance discriminated against interstate commerce, or even because it believed that the goal of reducing graffiti vandalism was insufficiently weighty to justify the incidental restriction on commerce created by the ordinance. Rather, the district court decided that the ordinance would fail to achieve its objective. As the court of appeals held, this determination lies beyond the authority of the federal courts. *Pike* does not authorize courts to conduct their own inquiry into the wisdom and utility of legislation. It requires courts to weigh the "putative local benefits" (397 U.S. at 142)—those that the legislature believes will flow from a chal-

lenged enactment, not whatever actual benefits a court predicts will be or finds are realized—against the burden on commerce imposed by the regulation.

Thus, the district court erred when it second-guessed the Chicago City Council's conclusion that a ban on the retail sale of spray paint would reduce the incidence of graffiti vandalism in Chicago. The court of appeals appropriately reversed that judgment. That court properly concluded that the ordinance should be upheld against Commerce Clause attack because the City Council could have rationally believed that the ordinance would achieve this putative local benefit. This judgment is correct; it conflicts with no ruling from any other circuit; and it deprived petitioners of no right to a hearing that they would have enjoyed in another circuit.

1. Petitioners contend that the decision below conflicts with decisions of this Court and other circuits, a claim that rests solely on petitioners' view that the Seventh Circuit repudiated the *Pike* test for nondiscriminatory regulations that burden interstate commerce only incidentally. Of course the court of appeals did no such thing. That court explicitly stated: "Our court has not questioned the 'validity' of *Pike* (for an inferior court must apply the Supreme Court's decisions without regard to doubts about their wisdom); we were, and are, obliged to determine the proper scope of its application." Pet. App. 10. The court of appeals interpreted *Pike* to require no "special justification" of laws that are facially nondiscriminatory, that do not discriminate against interstate commerce in either purpose or effect, and that only incidentally burden commerce in an effort to achieve some local benefit. Pet. App. 13. For such laws, "the normal rational-basis standard is the governing rule." *Id.* at 12.

That conclusion is both correct and noncontroversial. No decision of this Court or any circuit requires more than a rational basis for a legislature's conclusion about

whether the burdens of a regulation that gives rise to no discrimination against interstate commerce outweigh its benefits. Certainly petitioners cite no case that interprets *Pike* to require any heightened scrutiny of such legislation. Although petitioners have chosen to read the opinion below as holding *Pike* inapplicable to this category of cases, we think it equally fair to read it as holding *Pike* was applicable, but also that *Pike* requires no more than a rational basis to support the legislature's judgment that the burden on commerce created by the ordinance is justified by its benefits. Beyond that, we think it clear that the difference, if any, between our reading of the opinion below—that *Pike* is applicable but requires only minimal scrutiny—and petitioners' reading—that *Pike* was displaced and a rational-basis test used in its stead—is one of semantics only. Plainly this doctrinal nicety has no practical significance—petitioners themselves can identify no circuit that would apply more than rational basis scrutiny to a legislature's finding that a nondiscriminatory enactment will yield local benefits, much less one in which this case would have come out differently. The academic question whether *Pike* is applicable but requires only rational basis scrutiny, or is inapplicable though the rational basis test does apply, thus does not merit review by this Court.

This conclusion that the dormant Commerce Clause requires a special justification for facially nondiscriminatory legislation only when it has a discriminatory or disproportionate effect on interstate commerce has its origin in *Pike* itself. *Pike* involved an Arizona statute requiring that fruit grown in Arizona be packed there. This type of measure, while evenhanded on its face, is in fact classically protectionist—it burdens only nonlocal interests by requiring them to transfer some operations to the legislating jurisdiction. Such economic protectionism is forbidden by the Commerce Clause. Only last Term, the Court confirmed that *Pike* involved this type of discriminatory effect

on interstate commerce. See *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1682-83 (1994). See also *id.* at 1688-89 (O'Connor, J., concurring in the judgment); *id.* at 1700-01 (Souter, J., dissenting). The Seventh Circuit, which distinguished *Pike* on precisely that basis (see Pet. App. 12), is thus squarely in line with this Court's own view of *Pike*. Accordingly, the balancing that *Pike* requires is appropriate not for all cases of facially neutral regulation, but only those that "bear more heavily on interstate commerce than on local commerce," as the Seventh Circuit held. Pet. App. 11.

This Court's cases subsequent to *Pike* explain why the Commerce Clause requires more than a rational basis only when facially neutral laws impose greater burdens on interstate commerce than on local interests—the discriminatory effect of such laws gives the Court pause about whether the legislature fairly considered the magnitude of the burdens felt elsewhere and the necessity for imposing them. When a facially neutral law imposes discriminatory burdens on nonlocal interests there is reason to distrust the legislature's willingness to give sufficient consideration to those burdens. See, *e.g.*, *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670-71 (1981) (plurality opinion); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 441 (1978). Conversely, the cases have identified no reason to distrust an enactment that burdens local residents no less than nonlocal interests. To the contrary, this Court has long recognized that when a challenged enactment burdens local and out-of-state interests proportionately, there is no basis to assume that local legislatures will impose unjustified burdens on commerce, since those burdens will be felt by their own constituents. See, *e.g.*, *Clover Leaf Creamery*, 449 U.S. at 471 & n.17; *South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U.S. 177, 187 (1938).

Here, the district court found that the spray-paint ordinance was not discriminatory in either purpose and effect.

See Pet. App. 46; 803 F. Supp. at 142-43. Petitioners do not quarrel with that finding, for it is indisputable—for every dollar an out-of-state manufacturer or distributor loses in sales in Chicago, Chicago-based retailers also lose a dollar. Indeed, if anything, the ordinance disproportionately burdens Chicago retailers and residents. Under the ordinance Chicago residents must either do without spray paint altogether, or they must travel to the suburbs and then bring it back into the City, while Chicago retailers lose all of their spray-paint sales. In contrast, as the district court found, out-of-state distributors will lose only the fraction of their sales attributable to Chicago, and suburban retailers will actually gain sales. See Pet. App. 40-42. Hence there is no reason in this case to be suspicious of the legislative motivation and process—it is implausible to suggest that Chicago would place burdens on its own residents and businesses unless the legislature truly believed in the efficacy of the ordinance. And, if the ordinance proves ineffective, there is every reason to believe that local interests will assert themselves politically and secure its repeal. The justification for heightened scrutiny present when an enactment bears more heavily on nonlocal interests is absent here; and, at bottom, that is all the Seventh Circuit has held.

Petitioners' claim that the Seventh Circuit ignored *Pike* overlooks another important aspect of Commerce Clause jurisprudence. *Pike* itself admonished that courts, when applying the test, should balance the burden on commerce against the "putative local benefits" of challenged legislation. See 397 U.S. at 142. Petitioners appear to acknowledge this formulation (*e.g.*, Pet. 21 (urging a test that permits courts to conduct "an evidentiary hearing when weighing the burden imposed on interstate commerce versus the putative benefits of the ordinance")), yet they do not apply it. Their version of the Commerce Clause violation in this case ignores the "putative" local benefits—the reduction in graffiti vandalism in the City of Chicago.

The district court did not balance that putative benefit against the burden on commerce, and petitioners do not even attempt to explain how the burdens outweigh the benefits if they are accepted. Permitting a trial court to conduct its own inquiry into the benefits that will flow from a nondiscriminatory enactment reads the word "putative" out of the *Pike* test.

We know of no decision of this Court or any circuit in which a nondiscriminatory regulation was invalidated under the Commerce Clause based on a finding that it would not achieve local benefits. Certainly none of the decisions on which petitioners rely is such a case. *Pike* is not, for that statute was discriminatory in effect, as we explain above. And in other instances in which the Court has struck down facially neutral laws under the Commerce clause, it has done so by concluding that the statutes at issue bore more heavily on out-of-state interests and hence, in practical effect, discriminated against interstate commerce. See *Kassel*, 450 U.S. at 675-76 (plurality opinion); *Raymond*, 434 U.S. at 446-47.[3] In *Oregon Waste Systems v. Department of Environmental Quality*, 114 S. Ct. 1345 (1994), and again in *C & A Carbone*, the Court invalidated statutes as discriminating against interstate commerce and in favor of local interests. See *C & A Carbone*, 114 S. Ct. at 1682-84; *Oregon Waste Systems*, 114 S. Ct. 1350-51. These cases say nothing about the scope of review of legislative findings applicable when an enactment has no discriminatory purpose or effect.

Curiously, petitioners also rely on *Clover Leaf Creamery*, but in that case the Court upheld the challenged

[3] In fact, in *Kassel* the concurring and dissenting Justices—a majority of the Court—expressly concluded that a court lacks authority under the Commerce Clause to decide if a challenged enactment is efficacious in the absence of discrimination against interstate commerce. See 450 U.S. at 680 (Brennan, J., concurring in the judgment); *id.* at 690-93 (Rehnquist, J., dissenting).

statute against Commerce Clause attack, deferring to the legislature's judgment as to the utility of the legislation, despite the fact that the statute bore more heavily on the out-of-state distributors that used the type of milk cartons the Minnesota statute prohibited. See 449 U.S. at 473. Again, the Seventh Circuit explained *Clover Leaf Creamery* in precisely this way. See Pet. App. 12. *Clover Leaf Creamery* does not help petitioners at all.

Petitioners criticize the Seventh Circuit for identifying three different categories of Commerce Clause cases, but this Court has done just that. Even petitioners acknowledge that the Court distinguishes between regulations that expressly discriminate against interstate commerce and those that are facially neutral. See Pet. App. 16 (noting that the Court made this point in *Oregon Waste Systems*, 114 S. Ct. at 1350, and *C & A Carbone*, 114 S. Ct. at 1682). And, as we explain above, in this second category of cases, this Court has observed that heightened scrutiny is appropriate only when there is reason to believe the enactment bears more heavily on out-of-state interests not represented in the local political process. The Court has consistently deferred to local legislative judgments when there is neither a discriminatory purpose nor any discriminatory effect present. See, *e.g.*, *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).[4]

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[4] Petitioners further complain that the court of appeals' recognition of a category of cases requiring only rational basis scrutiny was inconsistent with the position we took in that court. This submission ignores an entire section of our brief in the court below. We expressly argued that, because the district court had found no discriminatory purpose or effect, the federal interest in protecting interstate commerce against discrimination was absent and there was "no reason why the federal courts need oversee the results of the local political process." Brief and Circuit Rule 30(a) Appendix of Appellant City of Chicago at 35. Accordingly, we argued that in this type of case "the *Pike* inquiry should ask no more than whether a rational basis exists for the legislature's conclusions." *Id.* at 36 n.15. That, of course, was the precise holding of the Seventh Circuit.

Petitioners also claim that the decision below is in conflict with decisions in other circuits, although they have not identified a single case like this one. Instead, they rely on cases in which a challenged enactment had a discriminatory purpose or effect. For example, in *Fireside Nissan, Inc. v. Fanning*, 30 F.3d 206 (1st Cir. 1994), Rhode Island had allowed existing in-state, but not out-of-state, automobile dealers within a 20-mile radius of a proposed new dealership to protest the establishment of that dealership. See *id.* at 209-14. Accordingly, the court assessed Fireside's claims of discriminatory purpose and effect under heightened scrutiny. See *id.* at 214-18. Significantly, the court upheld the statute even under that more stringent standard. See *ibid.* In *SDDS, Inc. v. South Dakota*, 47 F.3d 263 (8th Cir. 1995), the court considered a statute that required a referendum before an applicant could obtain a permit to construct a waste disposal facility. The court held that the statute had both a discriminatory purpose (*id.* at 268-70) and a discriminatory effect (*id.* at 270-71) and invalidated it (*id.* at 271-72). But even as it did so the court observed that heightened Commerce Clause scrutiny is not appropriate when an enactment does not have a discriminatory purpose or effect. See *id.* at 267-68. *Barber v. Hawaii*, 42 F.3d 1185 (9th Cir. 1994), involved legislation governing the anchorage and mooring of large boats within the ocean waters and navigable streams of Hawaii. The court examined both the alleged discriminatory effect—because the plaintiffs claimed that the statute bore more heavily on vessels from outside Hawaii—and the alleged burden on interstate commerce and upheld the statute. See *id.* at 1194-95.

Other cases petitioners cite invalidating state or local legislation are even easier to distinguish. *Cooper v. McBeath*, 11 F.3d 547 (5th Cir.), cert. denied, 114 S. Ct. 2675 (1994), for example, involved a state statute requiring persons holding permits under the alcoholic beverage code to be residents of the state. The court struck

it down as "simple economic protectionism." *Id.* at 548; see also *id.* at 553. *Diamond Waste, Inc. v. Monroe County*, 939 F.2d 941 (11th Cir. 1991), involved a county resolution that precluded importation of refuse from out of the county. This practice was branded as discriminatory in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and hence was invalid. The practice at issue in *Medigen of Kentucky, Inc. v. Public Service Commission*, 985 F.2d 164 (4th Cir. 1993), had two problems. There, haulers and transporters of infectious medical waste were required to convince a state commission that existing transportation services in a particular area of the state were not "reasonably efficient and adequate" in order to operate in that area. See *id.* at 166. The scheme thus acted as a barrier to entry into the market of hauling medical waste. See *id.* at 166-67. Such measures are always suspect because they preserve a noncompetitive market for local interests. Even worse, the measure was irrational. The state's asserted purpose for the legislation was to ensure that services for medical waste disposal were available at reasonable prices, yet the state could offer no explanation of how limiting access to the market could serve that purpose. See *id.* at 167.

Blue Circle Cement v. Board of County Commissioners, 27 F.3d 1499 (10th Cir. 1994), like *Medigen*, was a case with two problems not present here. There a zoning ordinance prohibited the use of hazardous waste fuel (HWF) at Blue Circle's cement factory. In fact, by requiring minimum acreage and set-backs from residential areas for all sites at which HWF could be burned, the ordinance effectively prohibited it everywhere in the county. See *id.* at 1510. The court's primary holding was that the district court had improperly converted a motion to dismiss into a motion for summary judgment without notice to the plaintiff, which had prejudiced Blue Circle's ability to present its case. See *id.* at 1503-04. In light of this procedural issue, much of the court's

discussion about the Commerce Clause issue is dicta. Further, the court was troubled by Blue Circle's Commerce Clause claim that the ordinance at issue had the practical effect of preventing the importation of HWFs into the county altogether, in order to protect its residents from their allegedly harmful effects. Given this claim, the court properly questioned whether the ordinance was "a reasonable response to protect a legitimate local concern or whether it [was] really a sham, with the purpose and effect simply of frustrating the policy of [federal law] to encourage the recycling of hazardous wastes and the safe use of HWFs." *Id.* at 1510. Here, petitioners do not claim that the spray-paint ordinance is a sham, and they did not claim or prove that it undermined federal policies. Thus, there is no conflict with *Blue Circle Cement*, which concerns an entirely separate branch of Commerce Clause jurisprudence. Where local legislators attempt to advance the interests of their constituents at the expense of interstate commerce, they engaged in simple protectionism justifying heightened Commerce Clause scrutiny. See, *e.g.*, *Oregon Waste Systems*, 114 S. Ct. at 1353-54; *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 112 S. Ct. 2019, 2026-27 (1992); *Chemical Waste Management v. Hunt*, 112 S. Ct. 2009, 2012-16 (1992). Petitioners do not advance such a claim here.

That leaves only *New York State Trawlers Association v. Jorling*, 16 F.3d 1303 (2d Cir. 1994). But that case neither conflicts with this one nor aids petitioners in any way. There the court held that regulations governing the taking of lobsters by trawlers were nondiscriminatory, and accordingly upheld them because they were "rationally related to advancing a legitimate state interest." *Id.* at 1308. That is precisely the approach of the court of appeals in this case.

Petitioners seem to acknowledge that the decision below is consistent with prior decisions in both the Third and

Seventh Circuits (from which this Court has denied certiorari). See *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 45 F.3d 813 (3d Cir. 1994), cert. denied, 115 S. Ct. 1176 (1995); *Old Bridge Chemicals, Inc. v. New Jersey Department of Environmental Protection*, 965 F.2d 1287 (3d Cir.), cert. denied, 113 S. Ct. 602 (1992); *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496 (7th Cir.), cert. denied, 493 U.S. 955 (1989). Although petitioners attempt to portray these circuits as renegades, petitioners do not explain how the validity of the spray-paint ordinance would have been decided any differently under any of the decisions that they cite. Rather, even in those cases, the courts defer to the legislature's judgment on the efficacy of nondiscriminatory regulation. See, *e.g.*, *Fireside Nissan*, 30 F.3d at 218; *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1014-16 (9th Cir.), cert. denied, 115 S. Ct. 297 (1994); *New York State Trawlers*, 16 F.3d at 1307-08. While we have not found a plethora of decisions addressing the test for truly nondiscriminatory regulations such as the spray-paint ordinance, this is likely because litigants rarely have the boldness to challenge social or economic legislation solely because they disagree with the legislature's judgment on the wisdom and utility of the legislation. The very notion of such a challenge harks back to the era of *Lochner v. New York*, 198 U.S. 45 (1905), when courts routinely second-guessed legislative policy judgments. Of course, *Lochner* is now long dead; the Court should reject petitioners' invitation to resurrect it.

2. Petitioners also seek review of the court of appeals' conclusion that they were not entitled to an evidentiary hearing on their Commerce Clause claim. It is puzzling that petitioners press this claim, since it is plainly a moot point at this stage in the litigation. Petitioners in fact received the evidentiary hearing—a six-day bench trial—to which they believe themselves entitled. As the case comes to this Court, petitioners' complaint about the Seventh Circuit's conclusion that the district court need

not have conducted this hearing is at best an academic question.[5]

And even on that abstract legal issue, petitioners fail to identify any material factual dispute between the parties that required a trial. Petitioners have never claimed that the spray-paint ordinance is discriminatory in purpose or effect, or that the burden it imposes on interstate commerce is more than incidental. Indeed, the court of appeals acknowledged that such claims might have required a trial, had petitioners made them. Pet. App. 13. But petitioners do not want these issues tried. They want a trial on the issue whether the ordinance will in fact ameliorate the problem of graffiti vandalism in Chicago. But as we explain above, courts have no authority to question the wisdom and efficacy of legislation that is nondiscriminatory in purpose and effect. Thus, as a matter of law, the question of the efficacy of the ordinance was not appropriate for resolution by a trial.

Petitioners' reliance on *Raymond*, *Kassel*, *Clover Leaf Creamery*, and *Blue Circle Cement* for this portion of their submission is misplaced. As we explain above, in each of those cases the challenged enactment bore more heavily on out-of-state interests, and hence created the type of discrimination that triggers heightened Commerce Clause scrutiny. The ordinance at issue here does not create the same problem.

Most likely, petitioners' real quarrel with the decision below is not over the now-moot question whether a trial should have been held, but instead about the court of appeals' failure to defer to the findings of fact that the

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[5] Petitioners attempt to make some hay out of Judge Rovner's concurring opinion, but it in fact is no more favorable to them than the majority opinion. Judge Rovner not only endorsed the majority's conclusion that heightened scrutiny is inappropriate in cases of nondiscriminatory enactments (see Pet. App. 16), but also added that "because plaintiffs never alleged that Chicago's ordinance discriminates against interstate commerce in any way, [the balancing test in] *Pike* was never activated, and a trial was therefore unnecessary." Pet. App. 17-18.

district court made on the efficacy of the spray-paint ordinance. Of course, once the district court concluded that the legislation was not discriminatory in purpose and effect, it had no authority to second-guess the legislative judgment on this point unless it was wholly irrational. And tellingly, petitioners do not quarrel with the holding below that, under the rational-basis test, the Chicago City Council could reasonably have believed that a ban on the retail sale of spray paint would ameliorate the problem of graffiti vandalism in Chicago. See Pet. App. 4-7. The district court's findings on which petitioners rely so heavily are simply irrelevant.

In fact, the Court made this very point in *Brotherhood of Locomotive Fireman & Enginemen v. Chicago R.I. & P. Co.*, 393 U.S. 129 (1968). At issue in that case were Arkansas statutes prescribing a minimum number of crew men for freight trains and train switching operations. The railroads, seeking to establish a Commerce Clause violation, claimed that the extra crewmen did nothing to add to safety in train operations. See *id.* at 135. In its findings of fact after a trial, the district court agreed. See *id.* at 135-36. This Court reversed, rejecting the entire mode of analysis undertaken by the district court: "We think it plain that in striking down the full crew laws . . . the District Court indulged in a legislative judgment wholly beyond its limited authority to review state legislation under the Commerce Clause." *Ibid.* The Court reasoned:

> The District Court's responsibility for making "findings of fact" certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was "pure speculation."

Id. at 139-40.

The same limitation on the authority of a district court applies here. The district court should not have rejected

a legislative policy judgment merely because it found petitioners' policy arguments more convincing than the legislature did. If that were the rule, many if not most legislative innovations that affect commerce could be set at naught, for when predictive judgments must be made about the efficacy of legislative solutions to vexing social problems, there will often be room for reasonable disagreement with the legislature's decision. Petitioners' expert witnesses testified at trial that the spray-paint ordinance will not ameliorate the problem of graffiti vandalism, and their views may well prove correct. But the conclusion of the City's experts that, by making spray paint less readily available to potential vandals, the ordinance will reduce graffiti vandalism, is plausible as well, as the court of appeals concluded. See Pet. App. 5-7. Under our constitutional framework, the resolution of such policy disputes should be in the legislatures, not the district courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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